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TORTS-LIABILITY LIMITATIONS UNDER THE WARSAW CONVENTION-The cargo liability limits of the Warsaw Convention are fully enforceable at the rate of \$9.07 per pound. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 104 S. Ct. 1776 (1984)

Dawn Davenport

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Casenotes and Statute Notes

TORTS—LIABILITY. LIMITATIONS UNDER THE WARSAW CONVENTION—The cargo liability limits of the Warsaw Convention are fully enforceable at the rate of \$9.07 per pound. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 104 S. Ct. 1776 (1984).

In 1979 Franklin Mint Corporation (Franklin Mint) delivered 714 pounds of numismatic¹ material to Trans World Airlines (TWA) for shipment from Philadelphia to London.² Franklin Mint did not make a special declaration of value at the time of shipment.³ The material was lost during the shipment and Franklin Mint sued for the value of the coins, \$250,000.⁴

Because the parties agreed that TWA was responsible for the loss,⁵ the extent of TWA's liability under the Warsaw Convention⁶ was the only issue.⁷ TWA claimed that the liability limits⁸ of the Warsaw Convention should be converted into United States currency by use of one of

¹ "Numismatic" is defined as relating to currency or coins. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1674 (2d Ed. 1951).

² *Franklin Mint Corp. v. Trans World Airlines*, 525 F. Supp. 1288 (S.D.N.Y. 1981).

³ *Trans World Airlines v. Franklin Mint Corp.*, 104 S. Ct. 1776, 1779 (1984). The terms of the Warsaw Convention provide that if the consignor makes a special declaration of value and pays an extra amount, if necessary, the carrier will be liable for the declared sum. Warsaw Convention, *infra* note 6, art. 22(2).

⁴ 104 S. Ct. at 1778.

⁵ *Id.*

⁶ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted at* 49 U.S.C. § 1502 (1982) [hereinafter cited as Warsaw Convention or the treaty].

⁷ 104 S. Ct. at 1778.

⁸ See *infra* note 23 and accompanying text.

three conversion factors: (1) the official price of gold prior to repeal of the Par Value Modification Act;⁹ (2) Special Drawing Rights (SDRs) established by the International Monetary Fund (IMF);¹⁰ or (3) the exchange value of the current French franc.¹¹ Franklin Mint argued that the free-market price of gold should be the correct conversion factor.¹² The district court found that the last official price of gold in the United States established by law was the appropriate unit of conversion and therefore awarded Franklin Mint \$6,475.98 plus interest and cost.¹³ The Court of Appeals for the Second Circuit affirmed the results reached in the district court, but held that sixty days hence the liability limits of the Warsaw Convention would be unenforceable in the United States. They based their decision on the fact that enforcement of the Warsaw Convention requires a conversion factor and there is no United States legislation specifying a conversion factor to be used by the court.¹⁴ *Held, affirmed judgment of the court of appeals but rejected its declaration that the Warsaw Convention is prospectively unenforceable*: The cargo liability limits of the Warsaw Convention are fully enforceable at the rate of \$9.07 per pound. *Trans World Airlines v. Franklin Mint Corp.*, 104 S. Ct. 1776 (1984).

I. BACKGROUND

A. History of the Warsaw Convention

The Warsaw Convention,¹⁵ originally negotiated in 1925 and 1929, is a treaty which regulates the liability of

⁹ Bretton Woods Agreement Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660 (1976) (codified as amended at 22 U.S.C. §§ 286-386K-2 (1982)). See *infra* text accompanying notes 64-87.

¹⁰ SDRs are defined as the average value of a defined basket of IMF member currency. See *infra* notes 81-83 and accompanying text.

¹¹ 525 F. Supp. at 1289. TWA did not argue for using the exchange value of the current French franc before the Supreme Court.

¹² *Id.*

¹³ *Id.*

¹⁴ *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303, 309-12 (2d Cir. 1982).

¹⁵ See *supra* note 6.

airlines for flights involving international transportation.¹⁶ The United States, while not a party to the original negotiations, adhered to the treaty in 1934.¹⁷ More than 120 nations, including the United States, continue to be bound by this treaty.¹⁸ The Warsaw Convention is now considered the primary source of law concerning the legal relationship between the airlines and their passengers and shippers for international air travel.¹⁹

The most important goal of the Warsaw Convention was to limit the liability of an airline in the event of personal injury or property damage.²⁰ The drafters of the treaty considered liability limits necessary to attract in-

¹⁶ 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.01[1] (1983) [hereinafter cited as L. KRIENDLER]; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967). For purposes of the Warsaw Convention, "international transportation" is defined as:

[A]ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty [overlordship], mandate or authority of another power, even though that power is not party to this convention.

Warsaw Convention, *supra* note 6, art. 1(2). The airline ticket is used to determine whether a flight is under the Warsaw Convention. Lowenfeld & Mendelsohn, *supra* at 500.

¹⁷ Lowenfeld & Mendelsohn, *supra* note 16, at 502. L. KREINDLER, *supra* note 16, at 11-3.

¹⁸ U.S. DEPARTMENT OF STATE, TREATIES IN FORCE 207-08 (1983).

¹⁹ Rhyne, *International Law and Air Transportation*, 47 MICH. L. REV. 41, 55 (1968).

²⁰ Lowenfeld & Mendelsohn, *supra* note 16, at 498-99. The liability limit was also a principal factor in the decision of the United States to ratify the Warsaw Convention. Secretary of State Hull, in his report to the Senate in 1934 concerning the treaty, stated:

It is believed that the principal of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Id. at 499-500.

A secondary goal of the Warsaw Convention was to establish a degree of uni-

vestment capital to the infant airline industry.²¹ Without these liability limits, the drafters feared investors would forego the airline industry because of the potential for catastrophic claims resulting from a single accident.²²

Article 22 of the Warsaw Convention limits the liability of international air carriers for injury to passengers and cargo.²³ The limitations are expressed in French francs which are further specified to consist of "65.5 milligrams of gold at the standard fineness of nine hundred

formity in documenting international air travel and in handling claims resulting from international flights. *Id.* at 498-99.

²¹ L. KREINDLER, *supra* note 16, at 11-2; Lowenfeld & Mendelsohn, *supra* note 16, at 499. See generally, Tompkins, *Limitation of Liability by Treaty and Statute*, 36 J. AIR L. & COM. 421 (1970). The imposition of liability limitations is a significant departure from ordinary American tort law, which attempts to make the victim "whole" again. L. KREINDLER, *supra* note 16, at 11-7. See generally, A. LOWENFELD, *AVIATION LAW*, ch. 7, § 1 (1981).

²² L. KREINDLER, *supra* note 16, at 11-2; Lowenfeld & Mendelsohn, *supra* note 16, at 499.

²³ Warsaw Convention, *supra* note 6, art. 22. Article 22 provides:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value to the consignor at delivery.

Id. Article 25 of the Warsaw Convention provides that the liability limits are not available if the accident was caused by willful misconduct. *Id.* art. 25. There has been much debate on the scope of article 25 and the meaning of "willful misconduct." There is some question whether there was an accurate translation of article 25 from the original French to English, but the basic idea is that "one must not be able to limit his liability for intentionally inflicted harm." A. LOWENFELD, *supra* note 21, at 7-77. L. KREINDLER, *supra* note 16, at 11-13, 11-23; Lowenfeld & Mendelsohn, *supra* note 16, at 503-04; Rhyne, *supra* note 19, at 59-61; Milligan, *Warsaw Convention — Did the Carriers Take All Necessary Measures to Avoid the Damage to the Convention — Or Was it Impossible For Them to Take Such Measures?*, 33 J. AIR L. & COM. 675, 678 (1967).

thousandths.”²⁴ The delegates to the Convention specifically rejected a French proposal to use an undefined French franc, preferring instead to tie the franc to a specified quantity and fineness of gold.²⁵ Article 22 also allowed the limits to be converted into any national currency.²⁶

Although the air carriers received the primary benefit from the Warsaw Convention through liability limits, the treaty also provided a *quid pro quo* to the passengers by making the carriers presumptively liable.²⁷ In the United

²⁴ Warsaw Convention, *supra* note 6, art. 22. Francs with this gold content are often called Poincare francs, deriving their name from the French prime minister whose government set the gold content for the franc. “The Poincare franc has been used in all gold clause limitations of liability provided for in multilateral conventions concerning transportation by sea or by air, concluded after 1924.” Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COM. 645, at 645-46 (1974).

²⁵ For example, the Swiss delegate expressed disfavor with using the French franc by stating:

Naturally, one can say “French franc” but the French franc, it’s your national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision. We must base ourselves on an international value, and we have taken the [gold] dollar. Let one take the gold French franc, it’s all the same to me, but let’s take a gold value . . . as a basis of calculation, be it American or French.

Trans World Airlines v. Franklin Mint Corp., 104 S.Ct. 1776, 1790 (1984) (Stevens, J., dissenting).

²⁶ Warsaw Convention, *supra* note 6, art. 22(4).

²⁷ *Id.* arts. 17, 18, 20, 21. The articles of the treaty which deal with carrier liability include the following:

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not

States, the Warsaw Convention establishes almost absolute liability within the limitations created by the treaty.²⁸ This trade-off is carried out through a shift in the burden of proof to the carrier in exchange for a limit to the carrier's liability.²⁹ The drafters considered the exchange reasonable due to the difficulty of passengers in determining the cause of an airline accident.³⁰

be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provision or its own law, exonerate the carrier wholly or partly from his liability.

Id. See L. KREINDLER, *supra* note 16, at 11-10. See generally, A. LOWENFELD, *supra* note 21, at 7-28; Lowenfeld & Mendelsohn, *supra* note 16, at 500.

²⁸ L. KREINDLER, *supra* note 16, at 11-11. For an exhaustive analysis of the airlines' liability and specifically their liability where the cause of damage/accident is unknown, see Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law* (pts. 1 & 2), 27 J. AIR L. & COM. 1, 119 (1960). The carrier is held liable unless satisfactory evidence is presented that it is not at fault. The burden of proof is on the carrier. *Id.* at 119, 124-25. It is exceedingly difficult for the air carrier to prove that they "have taken all necessary measures to avoid the damage or that it was impossible . . . to take such measures." L. KREINDLER, *supra* note 16, at 11-11.

²⁹ Lowenfeld & Mendelsohn, *supra* note 16, at 500.

³⁰ *Id.* This trade-off has been severely criticized as no longer applicable today. *Id.* at 519-22; L. KREINDLER, *supra* note 16, at 11-10. Today, "the benefit to the passenger derived from the presumption of liability is nominal. In civil law countries liability is presumed anyway. And in common law countries the doctrine of *res ipsa loquitur* is generally available to establish a prima facie case." L. KREINDLER, *supra* note 16, at 11-10. In 1934, the doctrine of *res ipsa loquitur* was not universally applied in all jurisdictions in the United States; therefore, the shift in burden of proof had a significant impact. Lowenfeld & Mendelsohn, *supra* note 16, at 521-22. *Res ipsa loquitur* is more universally applied in cases of unexplained airline accidents. Technically there is a difference between a shift in the burden of proof (provided by the Warsaw Convention) and the doctrine of *res ipsa loquitur*. "[I]n a litigated case, if the defendant offers no evidence as to the cause of the accident, plaintiff is entitled, under [the] Warsaw [Convention], to a directed verdict on the issue of fault, whereas under *res ipsa loquitur* he is entitled only to have his case submitted to the jury." *Id.* This technical distinction has resulted in few real differences in the outcome of cases. *Id.*

In addition to the doctrine of *res ipsa loquitur*, "[i]nvestigation of the causes of accidents has reached a very advanced stage and it is rare today that the probable cause of an accident cannot be determined as a result of the combined efforts of the governments concerned, the air carrier and the manufacturer." Tompkins,

The delegates to the Warsaw Convention saw the treaty as part of an on-going process³¹ and from the beginning there was debate concerning whether the liability limits were set at the correct level.³² As time progressed the battle lines have been clearly drawn with one side contending the limits are too low and the opposing side contending that the limits are satisfactory or too high.³³ Those in favor of raising the limits or doing away with liability limits completely contend that the maturing airline industry no longer needs the protection of liability limits.³⁴ Furthermore, those in the United States arguing that the limits are too low contend that limiting liability is contrary to the American tort system.³⁵

Those in favor of the liability limitations provision of the Warsaw Convention contend that the amount of the limit is satisfactory to the greatest number of nations, including less developed countries.³⁶ Liability limits pro-

Limitation of Liability by Treaty and Statute, 36 J. AIR. L. & COM. 421, 431 (1970) (footnote omitted).

³¹ R. HORNER & D. LEGREZ, SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, WARSAW, OCT. 4-12, 1929 (1975) (cited in Brief of Franklin Mint Corp. at 13, *Trans World Airlines v. Franklin Mint Corp.*, 104 S.Ct. 1776 (1984)). As a vice-president of the Warsaw Convention stated: "[W]e should consider that in air navigation, it is necessary to begin by laying down the primary general rules of the problem; we make a first effort and we must be happy to do so. If there are improvements to be brought forth, life does not end today, we can do them later on." *Id.*

³² Lowenfeld & Mendelsohn, *supra* note 16, at 504.

³³ *Id.*

³⁴ *Id.*; L. KREINDLER, *supra* note 16, at 11-9, 11-10; See generally A. LOWENFELD, *supra* note 21, § 1; Rhyne, *supra* note 19, at 54-64.

³⁵ Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 530 (1967). The purpose of the American tort system is to compensate the injured party. "It is absolutely basic and fundamental to American citizens that an injured person should be appropriately compensated for the loss he has sustained." *Id.*

³⁶ Parker, *The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929*, 14 J. AIR L. & COM. 37, 39 (1947).

The value placed on a human life varies widely in many countries of the world. In India, China, and Bolivia, for example, it is very low indeed; in Spain, Italy, and the Balkans but little higher. In the Netherlands and the Scandinavian countries it is much higher. In France, Germany as it was, and Britain it is higher still, and in the United States it is at a higher value than in any other country. It was generally agreed that a limitation of liability had to be established. At what figure should this limitation be set? It obviously had to be a

mote quick settlement of claims and result in uniform damage awards.³⁷ Another argument is that raising liability limits would increase the cost to passengers and shippers due to higher insurance rates³⁸ and if the passengers or shippers want higher limits, they can always self-insure.³⁹ Furthermore, staggering liabilities continue to exist for air carriers.⁴⁰

The debate over the Warsaw Convention has led to various revisions of the treaty, with the first proposed amendments occurring at the Hague Conference in 1955.⁴¹ Two changes were made to the liability limitation provisions of the treaty by the Hague Protocol.⁴² One change subjected the carrier to unlimited liability if it is proved that "the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result."⁴³ The second change doubled the liability limit contained in the Warsaw Convention and allowed the court, at its discretion, to award court costs and other litigation expenses.⁴⁴ The United

practical mean which would make it possible for all countries to ratify the Convention, for otherwise it could not become international law. This led to the adoption of what we in the United States would consider a relatively modest sum, with a *quid pro quo* of putting the responsibility on the carrier and making the burden of defense rest upon him rather than on the plaintiff.

Id.

³⁷ Kreindler, *supra* note 16, at 11-9. See generally Martin, *The Defendant's View of Montreal*, 33 J. AIR L. & COM. 538, 540 (1967).

³⁸ Hildred, *Air Carriers' Liability: Significance of the Warsaw Convention and Events Leading Up to the Montreal Agreement*, 33 J. AIR L. & COM. 521, 523 (1967).

³⁹ Martin, *supra* note 37, at 539-40; Hildred, *supra* note 38, at 523; Kreindler, *supra* note 16, at 11-9.

⁴⁰ Kreindler, *supra* note 16, at 11-8 (quoting H. DRON, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* (1954)). See generally Martin, *supra* note 37.

⁴¹ Lowenfeld & Mendelsohn, *supra* note 16, at 504. For a thorough discussion of the events surrounding the Hague Protocol, see Beaumont, *The Warsaw Convention of 1929, as Amended by the Protocol Signed at the Hague on September 28, 1955*, 22 J. AIR L. & COM. 414 (1955).

⁴² Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929, 478 U.N.T.S. 371 (1963) [hereinafter cited as the Hague Protocol].

⁴³ *Id.* at 383, art. XIII, 383.

⁴⁴ *Id.* at 381, art. XI, 381. The proposal provides in pertinent part:

States signed the Hague Protocol but it was never ratified by the Senate.⁴⁵

By 1965, having failed to ratify the Hague Protocol, the United States formally denounced the Warsaw Convention following the procedure set out under Article 39.⁴⁶ The denouncement was due to the low liability limits for personal injury and death.⁴⁷ The United States specified that it would withdraw the denunciation if there was a reasonable prospect of an international agreement eliminating liability limits or raising the limits to \$100,000 and if, pending an agreement, the airlines would agree to a limit of \$75,000 per passenger.⁴⁸

Negotiations following the United States' denunciation resulted in a private agreement⁴⁹ between the major air-

The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Id.

⁴⁵ For an exhaustive analysis of politics surrounding the Hague Protocol and its submission to the United States Senate, see Lowenfeld & Mendelsohn, *supra* note 16, at 509-46.

⁴⁶ *Id.* at 551. See generally Warsaw Convention, *supra* note 6, art. 39. Article 39 provides:

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties. (2) Denunciation shall take effect six months after notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Id.

⁴⁷ Lowenfeld & Mendelsohn, *supra* note 16, at 551-52; see, Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483, 486-87.

⁴⁸ Lowenfeld & Mendelsohn, *supra* note 16, at 552 (citing 50 DEP'T STATE BULL. 923 (1965)); Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291, 291 (1965).

⁴⁹ Comment, *From Warsaw to Tenerife: Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COM. 653, 669 (1980). The author stated that: "The Montreal Agreement, unlike the original Warsaw Convention and the Hague Protocol, is a 'special contract' in accordance with article 22(1). Proper tendering of ticket combined with reasonable notice of its

lines known as the Montreal Agreement of 1966.⁵⁰ One basic provision of the Agreement raised liability limits to \$75,000.⁵¹ The Agreement specified that the airline ticket must include notice of the liability limits.⁵² Under the Montreal Agreement, the air carriers relinquished certain defenses under Article 20 of the Warsaw Convention, resulting in airlines being almost strictly liable for accidents.⁵³ Upon the signing of the Montreal Agreement, the United States withdrew its denunciation.⁵⁴

The debate concerning the liability limits continued. Therefore, in 1971 the signators met to revise the Warsaw Convention.⁵⁵ The resulting Guatemala Protocol⁵⁶ increased the liability limit for personal injury, but did not raise the liability limits for cargo.⁵⁷ It also made the air-

contents will bind a passenger to its stipulated terms." *Id.* See *supra* note 23 for text of article 22(1).

⁵⁰ Civil Aeronautics Board, Order No. E-23680 (May 13, 1966), 31 Fed. Reg. 7302 (1966), *approving* Civil Aeronautics Board, Agreement 18900, Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (1966).

⁵¹ Montreal Agreement, *supra* note 50.

⁵² *Id.*

⁵³ *Id.* Article 20 of the Warsaw Convention provides:

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Warsaw Convention, *supra* note 6, art. 20. See Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 813, n.60 (1983). The author stated that "[t]he only defense left to the airlines under the Montreal Agreement is contributory negligence of the passenger under Article 21 of the Warsaw Convention." *Id.*

⁵⁴ Montreal Agreement, *supra* note 50.

⁵⁵ Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519, 519 (1972).

⁵⁶ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Doc. No. 8932 (1971) [hereinafter cited as Guatemala Protocol].

⁵⁷ *Id.* at 8, art. VIII. The liability limit for shipment of goods was not raised. The probable reason is that shippers usually take out insurance for their cargo. Mankiewicz, *supra* note 55, at 544.

lines absolutely liable.⁵⁸ The drafters based the Protocol's acceptance on ratification by the United States;⁵⁹ the parties to the Warsaw Convention are still waiting for the United States' ratification.⁶⁰

The most recent significant revision to the Warsaw Convention occurred in Montreal in 1975.⁶¹ This conference was held to adapt the treaty to changes in the international monetary system.⁶² To fully understand the Montreal Protocols⁶³ and their relation to the Supreme Court's decision in *Trans World Airlines v. Franklin Mint Corp.*, it is necessary to review the history of international monetary policy.

B. *History of International Monetary Policy in Relation to the Warsaw Convention*

Following World War I a gold exchange system was developed by the United States Federal Reserve Board and the Bank of England, whereby the United States dollar and other major currencies were convertible into a specific quantity of gold.⁶⁴ The United States Gold Standard Act of 1900 established the dollar's value at \$20.67 per troy ounce of gold.⁶⁵ In 1934, before the United States adhered to the Warsaw Convention, the United States devalued the dollar, thereby raising the price of gold to \$35.00 an ounce.⁶⁶

In 1944 forty-five countries held a conference, the Bret-

⁵⁸ See Guatemala Protocol, *supra* note 56, at 8, art. VIII. Mankiewicz, *supra* note 55, at 523-29; Comment, *supra* note 49, at 672-77.

⁵⁹ Comment, *supra* note 49, at 672-77.

⁶⁰ Comment, *supra* note 49, at 677; Comment, *supra* note 53, at 814.

⁶¹ FitzGerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. AIR L. & COM. 273, 275 (1976).

⁶² *Id.* at 275-77.

⁶³ Additional Protocol No. 1-4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929. ICAO Doc. Nos. 9145-9148 (1975).

⁶⁴ Heller, *The Value of the Gold Franc — A Different Point of View*, 6 J. MAR. L. & COM. 73, 79 (1974).

⁶⁵ 31 Stat. 45, ch. 41, § 1 (1900), cited in *Trans World Airlines v. Franklin Mint Corp.*, 104 S. Ct. 1776, 1781 (1984).

⁶⁶ Heller, *supra* note 64; Gold Reserve Act of 1934, 48 Stat. 337 (1934).

ton Woods Conference,⁶⁷ concerning the international monetary policy. An organization known as the International Monetary Fund (IMF) was created⁶⁸ at the conference and the United States became a member in 1945.⁶⁹ Members of the IMF were to maintain a "par value" for their currency and to exchange gold at the official price for balances of their currency held by other IMF nations.⁷⁰

Until the 1960's, there was very little interference by world government authorities in the private gold market.⁷¹ The market price for gold stabilized near the official price of \$35.00 per ounce with little help from world governments.⁷² In 1968, however, various world governments were unable to stabilize the market price of gold during a private gold buying rush.⁷³ At this time, the world governments developed a "two-tier" system of gold prices, with national governments using the official price

⁶⁷ See Heller, *supra* note 64.

⁶⁸ *Id.* The IMF was created to provide short-term credit for developing countries and to stabilize foreign exchange rates. P. SAMUELSON, *ECONOMICS* 686 (8th ed. 1970).

⁶⁹ Bretton Woods Agreement Act, 59 Stat. 512 (1945). By February 1974, 126 countries belonged to the IMF. Heller, *supra* note 64, at 79.

⁷⁰ See P. SAMUELSON, *supra* note 68, at 687. The Deputy Managing Director of the IMF stated:

[A]t the heart of the [Bretton Woods system] lies the proposition that the interests of the international community are best served by a system of multilateral surveillance and cooperation on exchange rates and exchange practices. The operating core of this proposition is the provision in the Articles of Agreement of the Fund that each country shall have a par value established in agreement with the Fund and shall maintain the exchange rates for its currency within a maximum of 1 percent fluctuation either side of the par value Secondly, the system provides that there could be changes in par values only when there is a fundamental disequilibrium but establishes the principle that exchange rates are a matter of international concern. It is left to the individual country to decide when to propose such a change. Thirdly, each country has the responsibility to establish and maintain the convertibility of its currency on the basis of freedom from restrictions on current payments, although in practice convertibility has been much broader.

Heller, *supra* note 64, at 80-81 (quoting the Deputy Managing Director of the IMF).

⁷¹ Heller, *supra* note 64, at 81.

⁷² *Id.*

⁷³ *Id.* at 82.

of \$35.00 per ounce among themselves, and all private transactions using the floating free-market price.⁷⁴ The establishment of this two-tier system was the beginning of the demise of the international gold-based monetary system.⁷⁵

In August, 1971, President Nixon severed the connection between gold and the dollar by refusing to convert official foreign dollars into gold.⁷⁶ In 1971 and 1973, the dollar was devalued with the official price of gold rising first to \$38.00 per ounce⁷⁷ and then to \$42.22 per ounce.⁷⁸ The price of \$42.22 per ounce remained until 1978.

By 1973, many of the major trading nations had failed to maintain a fixed par value for their currency and were allowing their currencies to fluctuate ("float") at the free-market price in clear violation of the Bretton Woods system.⁷⁹ Realizing that the Bretton Woods system was no longer being followed,⁸⁰ the IMF replaced gold as the foundation for the international monetary system with a unit of account known as the Special Drawing Right

⁷⁴ *Id.*

⁷⁵ *Id.* at 79-91. See generally, Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COM. 645, 650-652 (1974).

⁷⁶ Asser, *supra* note 75, at 651.

⁷⁷ Par Value Modification Act of 1972, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972); Heller, *supra* note 64, at 83, 86.

⁷⁸ Par Value Modification Act of 1973, Pub. L. No. 93-110, § 2, 87 Stat. 352 (1973); Heller, *supra* note 64, at 83, 85.

⁷⁹ Heller, *supra* note 64, at 84-86. Heller further states that:

The IMF put primary stress in its very early days on the fact that fluctuating rates were inconsistent with its Articles, but very soon pragmatic considerations began to overshadow the more technical ones and in certain circumstances the IMF recognized the exigencies of a situation and set up special rules for computing so-called "central rates" as a temporary expediency.

Id. at 84.

⁸⁰ *Id.* at 88. One author stated that: "Currency rates fluctuating according to the law of supply and demand could no more be recognized as official—according to IMF Articles—par values. The underlying principle of Bretton Woods that currency rates should be a matter of international concern was virtually a dead letter." *Id.* (quote by Arcari in a paper produced on behalf of the Secretariat of the International Institute for the Unification of Private Law in July, 1973. *Id.*)

(SDR).⁸¹ As of April 1, 1978, the SDR, defined as the average value of a specific basket of currency from IMF countries,⁸² was to become the lone reserve asset which IMF nations could use in transactions amongst themselves.⁸³ The United States Congress passed the Bretton Woods Agreement Act in 1976 implementing this change, and the United States dollar was no longer defined in terms of gold.⁸⁴ Congress repealed the Par Value Modification Act and as of April 1, 1978 there was no longer an official price of gold in the United States.⁸⁵ Gold became a "volatile commodity",⁸⁶ rather than an anchor in the international monetary system.⁸⁷

Against this background signators of the Warsaw Convention met at Montreal in 1975 to amend the treaty.⁸⁸ The major goal at this conference was to revise the Warsaw Convention to reflect the developments in the international monetary system.⁸⁹ Protocol No. 3 proposed to change the personal injury liability limits of the Guate-

⁸¹ Ward, *The SDR in Transport Liability Conventions: Some Clarification*, 13 J. MAR. L. & COM. 1, 2 (1981). The SDR was actually created by the IMF in 1969 but at that time was defined as one thirty-fifth of an ounce of gold. The IMF later severed the connection between gold and the SDR, thereby eliminating gold as the basis of the monetary system. 104 S. Ct. at 1781, n. 14.

⁸² Until 1981, the value of the SDR was based on a "basket" of sixteen currencies. On January 1, 1981, the number of currencies in the basket was reduced to five: the U.S. dollar, the West German mark, the French franc, the Japanese yen and the English pound sterling. Ward, *supra* note 81, at 3.

⁸³ *Id.* at 2.

⁸⁴ Bretton Woods Agreement Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660 (1976).

⁸⁵ *Id.* § 7.

⁸⁶ A. LOWENFELD, *supra* note 21, at 7-169. Lowenfeld stated:

Not only did gold (or more precisely the fixed gold/dollar ratio) no longer serve as an anchor to which a fixed price — or limit of liability — could be tied; by the mid-1970's, gold had become a volatile commodity, not related to a price index, or to the rate of inflation, or indeed to any meaningful economic measure, other than the views of whoever made up the market about all of the terrible things going on in the unpredictable world.

Id.

⁸⁷ *Id.*

⁸⁸ FitzGerald, *supra* note 61, at 275.

⁸⁹ *Id.*

mala Protocol from gold francs to SDRs.⁹⁰ Protocol No. 4 would raise the cargo liability limits and also would convert the new limits to SDRs.⁹¹ The Senate Committee on Foreign Relations presented a report in favor of Protocols 3 and 4, but the Senate failed to ratify them.⁹² This last revision to the Warsaw Convention still remains on the Senate calendar.⁹³

The responsibility of converting the Warsaw Convention's liability limits to the currency of the United States was delegated under the Federal Aviation Act⁹⁴ to the Civil Aeronautics Board (CAB).⁹⁵ Federal regulations require airlines to file tariffs with the CAB specifying in U.S. currency the cargo liability limits to which they adhere.⁹⁶ The CAB must reject tariffs that do not conform to CAB or FAA regulations⁹⁷ and the Warsaw Convention.⁹⁸ The CAB required airlines to use the official price of gold in converting the Warsaw Convention liability limits to dollars, and when the official price of gold was abolished in 1978, the CAB continued to use the last official price of gold.⁹⁹ The last official price of gold, \$42.22 per ounce, equates to a liability limit of \$9.07 per pound of cargo.¹⁰⁰

⁹⁰ Montreal Agreement No. 3, *supra* note 63, ICAO Doc. No. 9147, art. II, E-1; A. LOWENFELD, *supra* note 21, at 7-171. *See generally*, FitzGerald, *supra* note 61.

⁹¹ Montreal Agreement No. 4, *supra* note 63, ICAO Doc. No. 9148, art. VII, E-3; A. LOWENFELD, *supra* note 21, at 7-171. *See generally*, FitzGerald, *supra* note 61.

⁹² A. LOWENFELD, *supra* note 21, at 7-171, 7-175. *See generally*, FitzGerald, *supra* note 61.

⁹³ *Id.*

⁹⁴ Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1552 (1976).

⁹⁵ *Id.* During the years at issue in this case, CAB had the responsibility. The Court in *Franklin Mint* stated that: "With respect to foreign air transportation FAA powers are not exercised by the Department of Transportation in consultation with the Department of State. 49 U.S.C. § 1551 (Supp. V 1981). For simplicity [the Supreme Court] opinion will continue to refer only to the CAB." 104 S. Ct. at 1780, n.3.

⁹⁶ 49 U.S.C. § 1373(a) (1976).

⁹⁷ *Id.*

⁹⁸ *Id.* § 1502.

⁹⁹ CAB Order 78-8-10, 43 Fed. Reg. 35,971, 35,972 (1978).

¹⁰⁰ *Id.*

C. Cases

With the Senate's failure to ratify the Montreal Protocols, the United States courts were faced with the dilemma of what unit of conversion to use in converting the Warsaw Convention liability limits, which are expressed in terms of the French franc of a specified gold content,¹⁰¹ to United States currency. The courts chose among four basic standards: (1) the free-market price of gold;¹⁰² (2) the last official price of gold (used by the CAB);¹⁰³ (3) the SDRs;¹⁰⁴ and (4) the exchange value of the French franc at the time of the accident.¹⁰⁵

In *Kinney Shoe Corp. v. Alitalia Airlines*,¹⁰⁶ cargo being transported to Kinney via Alitalia Airlines disappeared during shipment.¹⁰⁷ The court granted summary judgment to Kinney on the issue of liability and then turned its attention to the appropriate amount of damages.¹⁰⁸ Without explaining its reasoning, the court used the value of the current French franc as the factor for converting the liability limits of Article 22 of the Warsaw Convention into United States dollars.¹⁰⁹

The court in *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*¹¹⁰ was faced with deciding the amount to award for damage to cargo which occurred during shipment via Pan American from Brazil to Texas.

¹⁰¹ See *supra* notes 23-26 and accompanying text.

¹⁰² *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways*, 531 F. Supp. 344, 353 (S.D. Tex. 1981).

¹⁰³ *In re Air Crash Disaster at Warsaw, Poland*, on March 14, 1980, 535 F. Supp. 833, 842 (E.D.N.Y. 1982).

¹⁰⁴ Although no U.S. court chose the SDRs as a conversion factor, it was presented as a possible factor to various courts. See, e.g., *id.* at 839; *Franklin Mint Corp. v. Trans World Airlines*, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981).

¹⁰⁵ *Kinney Shoe Corp. v. Alitalia Airlines*, 15 Av. Cas. (CCH) 18,509, 18,513 n.9 (S.D.N.Y. 1980).

¹⁰⁶ 15 Av. Cas. (CCH) 18,509 (S.D.N.Y. 1980).

¹⁰⁷ *Id.* at 18,510.

¹⁰⁸ *Id.* at 18,512.

¹⁰⁹ *Id.* at 18,513 n.9. "The Court may take judicial notice of the fact that the French franc is valued at approximately \$.24 as reported in the New York Times of October 2, 1980." *Id.*

¹¹⁰ 531 F. Supp. 344 (S.D. Tex. 1981).

The two factors the court considered for converting the liability limits of the Warsaw Convention into United States dollars were the former official price of gold and the current free-market price of gold.¹¹¹ After an extensive historical analysis of the treaty's liability limits and the developments in the international monetary system, the court stated that it would not use the former official price of gold;¹¹² rather, the court concluded that the only proper conversion factor since 1978 was the free-market price of gold.¹¹³

In *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*,¹¹⁴ claimants brought suit on behalf of decedents killed in an airplane crash in Warsaw, Poland.¹¹⁵ The court had to determine the correct conversion factor to use for the liability limits of the Warsaw Convention.¹¹⁶ The plaintiffs argued that the correct conversion factor was the free-market price of gold.¹¹⁷ The defendants asserted that the correct unit of conversion was the exchange value of the current French franc or the SDRs.¹¹⁸ The court also considered the last official price of gold in the United States, although neither side argued for this unit of conversion.¹¹⁹ The court rejected the conversion factors championed by the plaintiffs and defendants,¹²⁰ concluding that the last official price of gold is the correct

¹¹¹ *Id.* at 349.

¹¹² *Id.* at 353. The court determined that it should not "employ the fiction of an official U.S. price of gold in converting the limitation sums expressed in the [Warsaw] Convention." *Id.*

¹¹³ *Id.*

¹¹⁴ 535 F. Supp. 833 (E.D.N.Y. 1982).

¹¹⁵ *Id.* at 834.

¹¹⁶ *Id.* at 839.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 842. The court rejected the free-market price of gold because it would not provide constancy and stability and would therefore "directly contravene the intentions of all those who adopted the treat[y]." *Id.* at 842-43. The court rejected the current French franc and the SDR because "it would be a mistake to conclude from the fact that gold no longer plays a role in the international monetary system that all references to gold in the [Warsaw] Convention may be ignored in calculating the liability limitation and a new measure substituted." *Id.* at 843.

unit of conversion.¹²¹ The court stated the merit of using the last official price of gold is that this price "constitutes a conversion factor established by precisely the kind of mechanism that the [treaty's] drafters contemplated. . . ."¹²²

The district court in *Franklin Mint Corp. v. Trans World Airlines*¹²³ was asked to decide the correct unit for converting the liability limits of the Warsaw Convention into United States dollars.¹²⁴ Trans World Airlines argued for the SDRs, the last official price of gold in the United States, or the exchange value of the current French franc.¹²⁵ Franklin Mint Corporation introduced a fourth possibility: the free market price of gold.¹²⁶ The court concluded that because the last official price of gold was the conversion factor supported by the Civil Aeronautics Board, that factor "comes as close as anything to constituting a governmental interpretation of the Article 22 limitation."¹²⁷

Franklin Mint appealed the decision, causing the Second Circuit Court of Appeals to consider the issue of the appropriate conversion factor.¹²⁸ The court stated that there was a powerful argument against each of the suggested conversion factors.¹²⁹ Therefore, the court con-

¹²¹ *Id.* at 842.

¹²² *Id.* at 843.

¹²³ 525 F. Supp. 1288 (S.D.N.Y. 1981).

¹²⁴ *Id.* at 1289.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* The court further stated that if they "[w]ere . . . writing on a clean slate . . . [they] would find the arguments in favor of the . . . [SDR] most persuasive." *Id.*

¹²⁸ *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 103 S.Ct. 3085 (1983).

¹²⁹ *Id.* at 306.

The last official price of gold is a price which has been explicitly repealed by the Congress It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creation of the IMF, modified at will by that body and having no basis in the convention. The French franc is simply one domestic

cluded that it is impossible for the courts to enforce the Warsaw Convention since there is no conversion factor specified by law and because courts lack the power to select a new unit of conversion.¹³⁰

II. TRANS WORLD AIRLINES V. FRANKLIN MINT CORP.

On final appeal, *Franklin Mint* presented the Supreme Court with two questions: (1) whether the repeal in 1978 of the Par Value Modification Act¹³¹ eliminating an official price of gold rendered the liability limits of the Warsaw Convention unenforceable in the United States;¹³² and (2) if not, what is the correct unit of conversion for converting the gold-based liability limit of the Warsaw Convention into United States currency?¹³³ The Court unanimously agreed that the liability limits of the Warsaw Convention were not rendered unenforceable by repealing the Par Value Modification Act.¹³⁴ The Court differed as to the correct conversion unit; the majority chose the last official price of gold, in accordance with the CAB regulations,¹³⁵ and the dissent¹³⁶ advocated the free market price of gold.¹³⁷

The Supreme Court gave three reasons for rejecting the Court of Appeals' conclusion that repealing the Par Value Modification Act rendered the liability limits of the Warsaw Convention unenforceable.¹³⁸ First, the Court followed a canon of construction which provides that "[a]

currency, subject to change by the unilateral act of a single government.

Id.

¹³⁰ *Id.* at 306, 311. One United States District Court followed the lead of the Second Circuit. *In re Aircrash at Kimpo International Airport, Korea* on November 18, 1980, 558 F. Supp. 72 (C.D. Cal. 1983).

¹³¹ See *supra* note 85 and accompanying text.

¹³² 104 S. Ct. at 1782. The Court stated that this was the most important issue raised in *Franklin Mint*.

¹³³ *Id.* at 1778-79.

¹³⁴ *Id.* at 1778.

¹³⁵ *Id.* at 1779.

¹³⁶ Justice Stevens wrote the sole dissenting opinion.

¹³⁷ 104 S.Ct. at 1794-95.

¹³⁸ *Id.* at 1783.

treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of the Congress has been clearly expressed."¹³⁹ The Court noted that because repeal of the Par Value Modification Act "was unrelated to the [Warsaw] Convention,"¹⁴⁰ Congress' silence as to the Warsaw Convention in repealing the Act could certainly not be taken as a clear expression of their intent to abrogate the treaty.¹⁴¹ Second, the Court reasoned that because the Warsaw Convention was a "self-executing treaty"¹⁴² it needed no legislation to give it the force of law in the United States; consequently, repealing an unrelated domestic Act could not abrogate the treaty.¹⁴³ Finally, if abrogation of the treaty was intended, Congress or the Executive Branch was obligated under article 39 of the treaty to formally notify other signatories six months prior to withdrawal.¹⁴⁴ No notice was given and the Court noted that the Executive Branch maintained that the liability limits of the treaty should be enforceable in the United States.¹⁴⁵

Franklin Mint argued that under the doctrine of *rebus sic*

¹³⁹ *Id.* (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)).

¹⁴⁰ 104 S. Ct. at 1783.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* See generally, Warsaw Convention, *supra* note 6, art. 39. The text of article 39, is found, *supra*, at note 46.

¹⁴⁵ 104 S. Ct. at 1783. The Executive Branch stated in its Amicus Curiae brief: "[The Court of Appeal's] decision threatens to undermine a significant international law regime to which the United States is committed and to subject this country to adverse repercussions in the international community." Brief for the United States as Amicus Curiae at 17, *Trans World Airlines v. Franklin Mint Corp.*, 104 S. Ct. 1776 (1984) [hereinafter cited as Brief for the United States as Amicus Curiae]. Further, the Executive Branch asserted that if the court of appeals' opinion is allowed to stand,

[it] will have significant adverse consequences for the United States both in its immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of this country generally. The United States continues to regard the Warsaw Convention as a binding international agreement The United States remains committed to the Convention as the basic instrument governing questions of liability in the international aviation industry.

Id. at 7.

stantibus,¹⁴⁶ the Warsaw Convention was not enforceable because circumstances changed significantly since the promulgation of the treaty.¹⁴⁷ The Court countered this argument by explaining that while a *nation* might conceivably use changed circumstances for terminating its participation in a treaty, "a *private person* who finds the continued existence of the treaty inconvenient may not invoke the doctrine [of *rebus sic stantibus*] on their behalf."¹⁴⁸

Having concluded that the treaty limits were enforceable, the Court was presented with various alternatives as factors for converting the liability limits of the Warsaw Convention into United States currency. TWA argued in favor of either the last official price of gold or the SDR's created by the IMF.¹⁴⁹ Franklin Mint argued for the use of the free-market price of gold.¹⁵⁰ The Court chose the last official price of gold specified in the CAB's regulations concerning liability limits.¹⁵¹ The majority noted that the need for a conversion factor is derived from section 1373(a) of the Federal Aviation Act¹⁵² rather than from

¹⁴⁶ "A name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory as soon as the state of facts and conditions upon which they were founded has substantially changed." BLACK'S LAW DICTIONARY 1139 (5th ed. 1979).

¹⁴⁷ Brief of Franklin Mint Corp. at 40, *Trans World Airlines v. Franklin Mint Corp.*, 104 S. Ct. 1776 (1984) [hereinafter cited as Brief of Franklin Mint].

¹⁴⁸ 104 S. Ct. at 1783 (emphasis added). Since the Warsaw Convention allows nations to withdraw after giving notice, the doctrine of *rebus sic stantibus* lacks practical application except to avoid the required notice. *Id.* at 1783 n.24.

¹⁴⁹ Brief of Trans World Airlines at 15, 30, *Trans World Airlines v. Franklin Mint Corp.*, 104 S. Ct. 1776 (1984) [hereinafter cited as Brief of TWA]. TWA also argued in favor of the use of the current French franc in the lower courts but did not present this argument to the Supreme Court. Brief of Franklin Mint, *supra* note 147, at 27 & n.21.

¹⁵⁰ Brief of Franklin Mint, *supra* note 147, at 17 - 37.

¹⁵¹ 104 S. Ct. at 1784-87.

¹⁵² 49 U.S.C. § 1373(a) (1982) states as follows:

Every air carrier and every foreign air carrier shall file with the Board . . . tariffs showing all rates, fares, and charges for air transportation . . . and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation . . . The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States . . .

the Warsaw Convention.¹⁵³ CAB Order 74-1-16 requires using the last official price of gold as a conversion factor, which results in a \$9.07 per pound liability limit.¹⁵⁴ Therefore, the Court viewed using the official price of gold as an "Executive-Branch determination, made pursuant to properly delegated authority. . . ."¹⁵⁵ With this view, the Court decided to uphold this "Executive-Branch determination" unless it was contrary to domestic legislation or the Warsaw Convention.¹⁵⁶ Concluding that the CAB limit does not violate domestic laws,¹⁵⁷ the Court turned to the more difficult issue of whether it violated the treaty.

The Court analyzed the reasons why delegates to the treaty expressed the liability limits in terms of gold.¹⁵⁸ The Court found that the delegates' first purpose was to establish a limit on the airline's liability.¹⁵⁹ The majority conceded that any conversion factor, including the free-market price of gold, would have this effect.¹⁶⁰ The second purpose was "to set a stable, predictable, and inter-

¹⁵³ 104 S. Ct. at 1784.

¹⁵⁴ *Id.* at 1784 & n.25. CAB Order 74-1-16 was promulgated in 1974 and has been "actively reviewed" since 1978. CAB restated its position in support of the last official price of gold in CAB Order 78-8-10, promulgated in 1978. CAB Order 74-1-16 was in force during the dates at issue in this case. *Id.* at 1782.

¹⁵⁵ *Id.* at 1784. The dissent stressed that all powers delegated to the CAB must be exercised consistently with the Warsaw Convention. According to the dissent, CAB's opinion should not receive special deference in determining the meaning of the treaty: "[T]he CAB is not the governmental organ charged with enforcing the liability limitation — that responsibility rests with the courts of the United States." *Id.* at 1795 n.5. Instead, the dissent contended that the courts must apply the conversion factor specified in the treaty. *Id.* The dissent also disagreed with the Court on whether Congress delegated its authority over the currency to the CAB. The Court claimed that Congress did delegate its authority for the narrow issue of determining a conversion factor. *Id.* at 1784 n.26. The dissent claimed that Congress did not. *Id.* at 1796 n.6.

¹⁵⁶ *Id.* at 1784.

¹⁵⁷ *Id.* The Court reasoned that the CAB used the official price of gold when that price was specified by statute. When Congress repealed the Par Value Modification Act, however, it did not intend for the CAB to change the conversion factor. *Id.*

¹⁵⁸ *Id.* at 1785.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* "[I]n this regard a \$9.07 per pound liability limit is as reasonable as one based on SDRs or the free market price of gold." *Id.*

nationally uniform limit that would encourage the growth of a fledgling industry.”¹⁶¹ The Court concluded that “CAB’s choice”¹⁶² of a \$9.07 per pound liability limit satisfied this objective, especially if revised periodically to meet the need for international uniformity.¹⁶³ The Court noted that the \$9.07 per pound limit has been reasonably stable since 1978 in terms of conversion into other western currencies.¹⁶⁴ This standard has remained consistent with the value of the SDR during this same period of time.¹⁶⁵ The Court concluded that use of the free-market price of gold would fail to establish a stable unit of conversion because gold has become a commodity¹⁶⁶ which is subject to unpredictable swings in price.¹⁶⁷

The Court speculated that the third objective of connecting the liability limits to gold may have been to establish a constant value that would keep pace with the value of goods shipped.¹⁶⁸ While acknowledging that “a fixed, dollar-based liability limit” may not achieve this purpose, the Court concluded that the signatory nations never evidenced this purpose by their conduct since they allowed the value of the liability limits to decline from the beginning.¹⁶⁹ It reasoned that just as the conduct of con-

¹⁶¹ *Id.* “[T]he [Warsaw] Convention’s framers chose an international, not a parochial, standard, free from the control of any one country.” *Id.* (footnote omitted). The dissent, however, implicitly accused the Court of choosing a parochial standard. *Id.* at 1795 n.6.

¹⁶² *Id.* at 1795. Throughout the opinion the majority is careful to phrase the use of the last official price of gold as “CAB’s choice.” The dissent viewed this deliberate phrasing as implying that the majority might not have made the same choice. *Id.* at 1795 n.5.

¹⁶³ *Id.* at 1785.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* The dissent found it incredible that the Court was comforted by the fact that the \$9.07 per pound limit is as stable as a limit based on SDRs, despite the fact that the Montreal Protocols, which used a limit based on SDRs, were rejected by the Senate. The dissent concluded that “the CAB [is accepting] tariffs based on the [rejected] Montreal Protocols. . . .” *Id.* at 1798 n. 10.

¹⁶⁶ The dissent claimed that gold’s “nominal value is still overwhelmingly its value in exchange, not its value in use — it is not simply another commodity. Fort Knox does not house any pork bellies.” *Id.* at 1797 n. 9.

¹⁶⁷ *Id.* at 1786.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* “For a hypothetical 44-pound lost suitcase the liability limit was \$330 in

tracting parties must be considered when construing a contract, the conduct of the treaty signatories must be considered when construing a treaty.¹⁷⁰ Furthermore, the Court stated that use of the free-market price of gold would also not serve to establish a stable value of airline liability.¹⁷¹ "A liability limit tied to the gold market might be convenient for a dispatcher of gold bullion, but such a limit would simply force other air transport users and carriers to become unwilling speculators in the gold market. . . . The Convention was intended to reduce, not to increase, the economic uncertainties of air transportation."¹⁷²

After reviewing the reason why the delegates to the Warsaw Convention linked the liability limits to gold, the Court concluded that the \$9.07 per pound liability limit is "sufficiently consistent" with these purposes.¹⁷³ Furthermore, "tying the Convention's liability limit to today's gold market would fail to effect any purpose of the Convention's framers, and would be inconsistent with well-established international practice, acquiesced in by the Convention's signatories over the past 50 years."¹⁷⁴

1934, \$359 in 1972, and \$400 in 1974. In terms of purchasing power, 330 dollars in 1934 was equivalent to \$1031 in 1972 and \$1215 in 1974. . . . Clearly, the \$9.07 per pound liability limit does not represent the same value that was in effect when the United States adhered to the [Warsaw] Convention." *Id.* at 1786 n. 34.

¹⁷⁰ *Id.* at 1787.

¹⁷¹ *Id.*

¹⁷² *Id.* The dissent countered that this statement is "mere rhetoric" because the airlines strongly lobbied in favor of liability limits. Furthermore, the dissent stated that if the airlines do not like speculating in the gold market they can try to modify the treaty. The dissent noted that the airlines have tried to modify the treaty through the Montreal Protocols (which would substitute limits based on SDRs rather than gold), but have failed to obtain Senate ratification. The dissent concluded that through the majority's decision the airline's attorneys have won the battle their lobbyists had lost. *Id.* at 1798 n.9.

¹⁷³ *Id.* at 1785. The dissent claimed that the deficiency with this conclusion is that the delegates to the treaty adopted a gold-based limitation. *Id.* at 1795 n.6. The dissent stated that this free-market price of gold is the only conversion factor which reflects this gold-based limitation. *Id.* at 1794-95.

¹⁷⁴ *Id.* at 1785. In the dissent's opinion only, the purpose of stability and predictability is not served by the gold standard. This does not present a serious problem for the dissent since it would be easy to determine the exact liability limit on the date of shipment. Although insurance rates would have to reflect the vari-

Justice Stevens, the sole dissenter, agreed with the Court that the liability limits of the Warsaw Convention are enforceable in the United States.¹⁷⁵ However, Justice Stevens favored the free-market price of gold as a conversion factor.¹⁷⁶ He stated that his approach to determining the appropriate conversion factor differed from the Court's approach because he believed that the Court first should determine and then should apply the liability limits specified in the convention.¹⁷⁷ He stressed that the plain language of the treaty ties the liability limits to gold, not a fixed-dollar amount.¹⁷⁸ Justice Stevens claimed that the majority reformed the Warsaw Convention "to correspond more closely to the Convention's 'purposes' than the limitation actually selected by the Convention itself."¹⁷⁹ The express language of the treaty, the debate of the delegates, and the contemporary law of nations made it clear to Justice Stevens that the gold clause was intended to insure that payment would be "in dollars of a value as constant as that of gold,"¹⁸⁰ and that therefore,

ances in the gold market, this is hardly a task incapable of accomplishment. *Id.* at 1797-98 & n.9.

¹⁷⁵ *Id.* at 1788-98.

¹⁷⁶ *Id.* at 1794-95.

¹⁷⁷ *Id.* at 1795.

¹⁷⁸ *Id.* at 1788, 1790-91.

¹⁷⁹ *Id.* at 1788.

¹⁸⁰ *Id.* at 1792. (citing *Norman v. Baltimore & O.R.R.*, 294 U.S. 240, 302 (1935)). The dissent states that the delegates to the Warsaw Convention had deliberately avoided having liability limits expressed in terms of a national currency. *Id.* at 1790; see *supra* note 25 and accompanying text. Gold clauses were common in treaties, therefore the dissent looked to the interpretation given to these clauses in other treaties. The dissent quoted the Permanent Court of International Justice in *Payment of Various Serbian Loans Issued in France*, Hudson II W.C. 340 (1929), *Payment in Gold of Brazilian Federal Loans Issued in France*, Hudson II W.C. 402 (1929), (*Serbian and Brazilian Bond Cases*) (July 12, 1929) as follows:

[I]t is not admissible to assert that the standard should not govern the payment because the depreciation in French currency was not foreseen, or, as it is insisted, could not be foreseen at the time the contracts were made. *The question is not what the Parties actually foresaw, or could foresee, but what means they selected for their protection.* To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard [of weight and fineness]. . . .

the free-market price of gold should be the conversion factor.¹⁸¹

The dissent stressed that delegates to the Warsaw Convention specifically chose an international, rather than a parochial, standard.¹⁸² Justice Stevens argued that the court has returned to a parochial standard by choosing a conversion factor based on a national currency.¹⁸³ He viewed this factor as being wholly within the control of the United States and therefore contrary to the manifest intent of the delegates to the treaty.¹⁸⁴ The dissent acknowledged that the gold clause may be a relic, but contended that it was required by the Warsaw Convention.¹⁸⁵ Hence, Justice Stevens stated the Court is obliged to apply this conversion factor just as it is obliged to apply the liability limits.¹⁸⁶ Justice Stevens noted that when there was an official price of gold, conversion to United States dollars was determined by law.¹⁸⁷ Although the international monetary system may no longer be based on gold, the dissent claimed that the Warsaw Convention's standard of value is still based on gold.¹⁸⁸ Justice Stevens stated that "[t]he price of gold is simply no longer fixed

104 S. Ct. at 1791 (emphasis by dissent).

¹⁸¹ *Id.* at 1792.

¹⁸² *Id.* at 1790-91. The dissent stressed that the delegates to the Warsaw Convention rejected a standard based on a national currency, preferring instead to tie the limits to a specific quantity and fineness of gold. *Id.*

¹⁸³ *Id.* at 1795 n.6.

¹⁸⁴ *Id.* at 1790 "[T]he delegates had selected as the standard of value a commodity with a value independent of any one nation's control; indeed, a commodity perceived to have 'intrinsic' value — a commodity individuals had valued before there were nations, and would value whether or not national governments made it an official medium of exchange." *Id.* at 1790 n.2.

The Court agreed that the delegates chose an international standard; there is, however, no discussion in the Court's opinion of the necessity of the standard being outside the control of any one nation. In fact, the Court concluded that the treaty's goal of establishing an internationally uniform limit would necessitate periodic adjustments of the conversion factor by the CAB. *Id.* at 1785. The Court clearly anticipated further control by the U.S. government.

¹⁸⁵ *Id.* at 1793-94.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1794.

¹⁸⁸ *Id.* "Gold has now been demonitized. But the [Warsaw] Convention's standard of value remains and the concept of value has not changed." *Id.*

by law. Gold, however, still will exchange for dollars. The rate at which a domestic currency exchanges for gold was and is the only 'conversion' permitted or anticipated by the Convention. That figure is the liability limitation of the Warsaw Convention."¹⁸⁹

III. PRACTICAL IMPLICATIONS & CONCLUSION

Both the Court and Justice Stevens claim their choice of a conversion factor is supported by the Warsaw Convention delegates' purpose in establishing liability limits. The opinions cite the following purposes for establishing liability limits expressed in terms of gold: (1) setting some limit on a carrier's liability for lost cargo; (2) setting a stable and predictable limit; (3) setting a constant value that would keep pace with the value of cargo; and (4) setting an internationally uniform limit.¹⁹⁰ Both the Court and the dissent acknowledged that any conversion factor would achieve the first purpose,¹⁹¹ and both also acknowledged that the second purpose is best achieved by the Court's choice of the last official price of gold.¹⁹² The Court conceded that its choice of a fixed, dollar-based factor may fail to achieve the third purpose,¹⁹³ but this author does not see that the free-market price of gold will better approximate the value of cargo.

The dissent argued that the Court's choice of the fixed, dollar-based liability limit does not meet the fourth purpose, establishing an internationally uniform limit.¹⁹⁴ The dissent noted that the delegates to the Warsaw Convention specifically avoided tying the liability limits to any one national currency, opting instead for an international value such as the price of gold.¹⁹⁵ As the majority notes, however, the liability limit in the United States was always

¹⁸⁹ *Id.* at 1794-95.

¹⁹⁰ *Id.* at 1785-86, 1797 n.9.

¹⁹¹ *Id.* at 1785, 1797 n.9.

¹⁹² *Id.*

¹⁹³ *Id.* at 1786.

¹⁹⁴ *Id.* at 1797 n.9.

¹⁹⁵ *Id.* at 1791. See specifically the Swiss delegate's statement quoted *supra* at

based on a fixed-dollar amount because Congress set the conversion rate between gold and the dollar.¹⁹⁶ This conversion rate bore no relation to the free-market price of gold. The only difference resulting from the Court's choice of the \$9.07 per pound limit is that now the conversion rate is established by the CAB rather than Congress. In this author's opinion, the dissent has failed to reconcile the discrepancy of accepting the fixed-dollar based liability limit when Congress set the rate at which the dollar converted into gold and yet rejecting this same liability limit when the CAB set the conversion rate.

The Supreme Court in *Trans World Airlines v. Franklin Mint Corp.* has allocated the risk of insuring cargo loss to the shippers. This allocation of risk will undoubtedly apply to both the sophisticated shipper as well as to the tourist with a piece of crystal in his luggage. If the cargo is worth more than \$9.07 per pound, it should be insured by the shipper.

This opinion does not address the liability limits for personal injury. In this author's opinion, this case cannot be read as allocating to the passenger the risk of insuring against personal injury. The American courts will continue to find ways to avoid applying the treaty's liability limits to personal injury claims.

Throughout the Supreme Court's opinion there are undertones of distaste for the liability limits of the Warsaw Convention. The Court used subtly disapproving language,¹⁹⁷ while the dissent flatly states that the treaty's liability limits are "anachronistic in today's world of aviation."¹⁹⁸ The dissent agreed with the Court that the political branches of government have the exclusive

note 25. The majority concludes that this purpose can be satisfied by periodic adjustments to the \$9.07 per pound limit by the CAB. *Id.* at 1785.

¹⁹⁶ *Id.* at 1784 n.26.

¹⁹⁷ *Id.* at 1786-87. The Court stated that the treaty was intended to last only a few years, not one or two centuries. *Id.* at 1786. The Court further stated that they are enforcing the liability limits because the political branches of the government have not chosen to repudiate these limits. *Id.* at 1787.

¹⁹⁸ *Id.* at 1793.

power to repudiate the Warsaw Convention.¹⁹⁹ Clearly, the Supreme Court is calling on the political branches to either adopt the latest amendment to the Warsaw Convention or to repudiate the treaty. Definitive action by the political branches of the United States government concerning the Warsaw Convention is certainly needed.

Dawn Davenport

¹⁹⁹ *Id.* at 1787, 1793-94.

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